(32)

No. 390

In The

SUPREME COURT OF THE UNITED STATES

WILLIAM NIKLAUS, MARY V. NIKLAUS AND LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, PETITIONERS,

V.

THE LINCOLN JOINT STOCK LAND BANK OF LINCOLN, NEBRASKA, A CORPORATION, RESPONDENT.

ANSWER BRIEF OF RESPONDENT.

C. A. SORENSEN,
Counsel for Respondent.

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ANSWER BRIEF OF RESPONDENT.

C. A. SORENSEN,
Counsel for Respondent.

STATEMENT OF CASE.

This is a suit in equity brought by the respondent in the District Court of Lancaster County, Nebraska, to foreclose a real estate mortgage (Trans. pp. 15-29).

Trial was had on the second amended and supplemental petition of this respondent (plaintiff in said cause), the answers of the petitioners in this court and

others (defendants in said cause), the replies of the respondent to said answers, and the evidence (Trans. pp. 46-47). The trial court in the decree of foreclosure found and determined that it had jurisdiction of the parties and of the subject matter of the action; found generally for the respondent and against the petitioners, and found that the allegations of respondent's petition were true (Trans. p. 47). In addition, the trial court found that the mortgage being foreclosed had been duly executed and delivered to the respondent to secure loan to mortgagor, one Lafayette P. Barnes, of $35,000 by the respondent; that the mortgage was duly filed for record and recorded November 22, 1922; that at the time of the execution, delivery and filing for record of the mortgage, the mortgagor was the owner of land mortgaged; that the mortgage was a first lien thereon; that there was due to the respondent $76,477.08, which sum the mortgage was given to secure; that the respondent was entitled to a foreclosure of the mortgage for the satisfaction of the amount found due, and that "any right, title or interest of the defendants, William Niklaus, Mary V. Niklaus, Loup River Public Power District, a corporation, and the other defendants, if any, in and to said premises, are inferior and subject to the lien of said mortgage" (Trans. pp. 47-48).

On appeal to the Supreme Court of Nebraska the decree and judgment of the trial court was affirmed (Trans. pp. 57-66). The respondents filed motion for rehearing (Trans. pp. 66-70) which was denied (Trans. p. 70).

The appeal to the Supreme Court of Nebraska was taken without the submission of bill of exceptions to that court (Trans. p. 59).

There was before the Supreme Court of Nebraska the trial court's findings of fact and conclusions of law pursuant to which the decree of foreclosure was entered (Trans. pp. 59-60). The petitioners, however, have failed to include within the transcript of record, filed in this court, said findings of fact and conclusions of law.

In their petition for writ of certiorari and supporting brief, counsel for petitioners make numerous misleading, and some false, statements as to what the transcript of record shows. Among other things, counsel for petitioners assume to be true allegations in the answers of the petitioners to respondent's foreclosure petition which are denied in the replies of the respondent thereto. Attention is directed to the following inaccuracies and omissions:

1. On page 2 of petitioners' petition and brief, under the heading of "The Material Facts," it is stated as a fact that petitioner William Niklaus acquired legal title to a tract of land by deed from Amanda J. Erickson and Paul W. Erickson, whose "grantors acquired title by descent from H. E. Erickson, who acquired title by warranty deed, under date of February 8, 1916, from Lafayette P. Barnes, deed recorded December 10, 1925."

In support of this statement, counsel for petitioners refer to paragraph 20 of respondent's foreclosure petition in which the respondent alleges only that on December 10, 1925, there was filed for record and recorded an instrument "*purporting* to be executed by the defendants Lafayette P. Barnes and Lottie M. Barnes, his wife, and to convey to one H. E. Erickson" a part only of the real estate involved in the foreclosure action; that

Amanda J. Erickson and Paul W. Erickson were heirs at law of said H. E. Erickson; that on April 14, 1938, there was filed for record and recorded a quit claim deed executed by Amanda J. Erickson, Paul W. Erickson and Ann Louise Erickson *purporting* to convey to William Niklaus the real estate in question; that "William Niklaus claims to have some interest in or lien upon said real estate, or right of redemption from sale, the exact nature of which is unknown to the plaintiff, and is, or claims to be, in possession of said real estate," and that "whatever interest, if any, the defendants Amanda J. Erickson, Paul W. Erickson, Ann Louise Erickson, and William Niklaus, or either of them, have in and to said real estate is subject, junior, and inferior to the lien of the plaintiff and the legal and equitable rights thereunto appertaining" (Trans. p. 27).

2. On page 3 of petitioners' petition and brief, it is stated that "William Niklaus entered into peaceful possession of the lands immediately after he acquired title and was in the actual, continuous possession thereof at all times since until he was evicted by a writ of assistance in manner and form hereinafter shown."

In support of this statement no reference to the transcript of record is made and nowhere therein does it appear that the petitioner William Niklaus was ever evicted from any real estate.

3. On page 3 of petitioners' petition and brief, it is also stated that "The respondent claims title to the same lands" by virtue of a mortgage from Lafayette P. Barnes and "through the quit claim deed by Frank Rutherford." The citations do not sustain the allegations; the respondent does not claim title through Barnes or Rutherford.

4. On page 5 of petitioners' petition and brief, it is stated that "The petition which petitioners were summoned into court to answer was abandoned by the filing of another or substituted petition, under date of July 18, 1940."

The citation does not sustain the allegation; on its face and by its language the petition filed by the respondent, on July 18, 1940, was an "amended and supplemental petition" (Trans. p. 15).

5. On page 9 of petitioners' petition and brief, it is stated that "On the issue of the statute of limitations the case was submitted to the court below on the facts appearing on the face of the plaintiff's petition and the plea of the statute of limitations contained in the petitioner's answers."

The record only shows that the question of the statute of limitations was raised in the answers; not how the issue was submitted. Replies were filed to the answers of the petitioners denying all allegations therein made (Trans. pp. 45-46) and the decree of the trial court was based on the pleadings *and the evidence* (Trans. p. 46).

6. On pages 9 and 10 of petitioners' petition and brief, it is stated that "At some time after the case was argued and submitted in the appellate court and the date of the order of affirmance and without notice to the petitioners and without an opportunity to be heard thereon, the court below, on its own motion, interpolated in the case the following facts: 'From March 9, 1929, until sometime in 1938 the appellee herein (respondent) was restrained and enjoined by the federal court from

proceeding further and the trustee of said court during that period was in possession of the premises.' " On page 11 the petitioners assert that the Supreme Court of Nebraska decided "the issue on the statute of limitations on the basis of supplied facts."

The citations to the transcript of the record given by counsel for the petitioners do not show that the Supreme Court of Nebraska "interpolated" or "supplied" any facts. That court had before it for its use the findings of fact of the trial court (Trans. pp. 59-60).

7. On pages 16 and 17 of petitioners' petition and brief, under heading entitled "The Facts," it is stated that "The Facts giving rise to the issues of law herein discussed are not in dispute and are found in the petition upon which the case was tried * * *." Counsel for petitioners then proceeds to set forth as facts admitted by the respondent that on February 8, 1916, Lafayette P. Barnes transferred the title to the real estate in question to H. E. Erickson; that in 1932 Erickson died "while the owner of the lands;" that Amanda J. Erickson and Paul W. Erickson transferred the title to William Niklaus; that Niklaus entered into peaceful possession of said lands; and that on August 29, 1922, Lafayette P. Barnes, "acting in fraud of the rights of H. E. Erickson and in disregard of the covenants of warranty of his deed of February 8, 1916, executed a mortgage on the same lands to the respondent herein under such circumstances as to raise the inference that respondent was implicated in the fraud."

As to most of these statements no citations to the transcript of record are given, and those given do not support the allegations.

8. On page 18 of petitioners' petition and brief, it is stated that on June 7, 1928, the respondent commenced an action to foreclose its mortgage against Frank Rutherford and others and that while the suit was pending the respondent acquired title to the mortgagor's equity of redemption and "discontinued the pending suit."

There is nothing in the transcript of record to show that the respondent ever commenced a foreclosure action against Frank Rutherford or that the foreclosure case was ever discontinued. As to the quit claim deed obtained by the respondent from Frank Rutherford and his wife, the respondent in its foreclosure petition alleges that in acquiring the same it did not intend or elect that its rights as mortgage lien holder should in any manner be affected by merger or otherwise, and in acquiring said title the plaintiff expressly reserved and asserted all its rights as the owner and holder of said mortgage deeds without merger of the same in said title" (Trans. pp. 25-26).

9. On page 18 of petitioners' petition and brief it is stated that the respondent "admits knowledge of the ownership of the lands in H. E. Erickson and his successors in title as early as December 10, 1925." The record does not show that the respondent ever made any such admission of ownership. On the contrary, the respondent alleges in its foreclosure petition that said H. E. Erickson filed a petition in the District Court of Lancaster County, Nebraska, in 1927, in which he asserted that a person other than himself was the owner of the real estate in question (Trans. pp. 27-28).

ARGUMENT.

In this cause the record before the Supreme Court of Nebraska did not contain a bill of exceptions (Trans. p. 59). In its absence the Supreme Court could only determine whether the pleadings sustain the judgment rendered thereon. *Wheeler* v. *Boiler,* 129 Neb. 792, 263 N. W. 123. In such case it will be presumed that all issues of fact raised by the pleadings received support from the evidence and that such issues were correctly determined. *Prokop* v. *Mlady,* 136 Neb. 644, 287 N. W. 55; *Backes* v. *Schlick,* 82 Neb. 289, 117 N. W. 707. From an examination of the second amended and supplemental petition of the respondent, upon which the foreclosure case was tried, the Supreme Court found that it sustained "the findings of fact of the lower court and the decree entered thereon" (Trans p. 60).

The transcript of record filed in this court does not contain the findings of fact and conclusions of law of the trial court which were before the Supreme Court of Nebraska for its use. And, as has been pointed out, the statement of the case by counsel for the petitioners is in many particulars inaccurate and in some instances false. It is replete with innuendoes and conclusions not supported by the record. The bald assertion that the Supreme Court of Nebraska "modified the facts, dehors the record and upon the changed record entered its order of affirmance" (petition for writ and brief, pp. 21-22) is not supported by the record before this court, is malicious, utterly unwarranted, and constitutes contempt of, and an insult to, the Chief Justice and the judges of the Supreme Court of Nebraska.

The petitioners complain of many things, lack of jurisdiction of the equity trial court to try the case, misjoinder of parties and of causes of action, deprivation of trial by jury, merger of mortgagor's title in the mortgagee, and failure of the Supreme Court of Nebraska to recognize the running of the statute of limitations. Throughout the petition and supporting brief the petitioners ignore the fact that the respondent seeks equitable relief only, [redacted] the establishment of a lien and the foreclosure thereof. It is not an action for the recovery of real property or of money. All that the respondent asks is that the land be sold and out of the proceeds there be taken an amount sufficient to liquidate the respondent's lien on the land (Trans. p. 28). The balance of the proceeds, if any, will go to the owners of the equity of redemption. If the H. E. Erickson deed is valid, subject only to respondent's mortgage, said Niklaus has an equity of redemption. The petitioners were made defendants for the sole purpose of establishing their rights in relation to respondent's mortgage and adjusting claimed priorities. All that respondent alleges in its petition with respect to petitioners is that any right, title or interest which they may have in the lands are inferior and subject to the lien of the mortgage (Trans. p. 27).

The petitioners appear to rely on two propositions, first, that they were wrongfully deprived of a jury trial, and second, that the respondent's right to foreclose the mortgage was barred by the statute of limitations.

I. The Supreme Court of Nebraska Did Not Err in Holding That Respondent's Right to Foreclose Mortgage Was Not Barred by the Statute of Limitations.

Respondent's original foreclosure petition was filed on June 8, 1928 (Trans. pp. 24-25); amended and supplemental petition was filed March 18, 1940 (Trans. p. 1), and second amended and supplemental petition, on which decree and judgment was rendered, was filed July 18, 1940 (Trans. p. 15). The Supreme Court of Nebraska found that the cause of action set forth in the original petition and in the second amended and supplemental petition upon which the case was tried, were the same, and that the second amended and supplemental petition did not introduce a new cause of action, the cause of action in both petitions being for the purpose of foreclosing the same mortgage on the same premises (Trans. pp. 65-66).

As alleged by counsel for petitioners, the cause of action accrued on June 7, 1928 (Trans. p. 24). The suit to foreclose the mortgage was brought the next day (Trans. pp. 24-25) and is still pending. The Supreme Court of Nebraska found that the bringing in of additional parties defendant was necessary and proper by reason of the death of H. E. Erickson and subsequent conveyances from his heirs and successors in title (Trans. pp. 65-66). Section 20-856, Compiled Statutes of Nebraska for 1929, referred to by the court, reads as follows:

> "Either party may be allowed on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply alleging facts material to the case, *occurring after the former petition*, answer or reply."

In *Kennedy* v. *Potts,* 128 Neb. 213, 258 N. W. 471, an action for foreclosure of a tax lien, the Supreme Court of Nebraska said:

> "It is a rule that, where an action is commenced before the cause of action is barred by the statute of limitations, but subsequent to the running of the statute an amended petition is filed, in which the allegations of the petition are amplified, and there is no change in the cause of action, filing of such amended petition does not affect the plaintiff's right of recovery."

Upon the amendment of a petition, where, as in the case at bar, the identity of the cause of action is preserved, and the claim of the plaintiff not substantially changed, the action will be held as commenced on the date of the filing of the original petition and service of summons therein. *Schuyler National Bank* v. *Bollong,* 28 Neb. 684, 45 N. W. 164; *Davis* v. *Manning,* 97 Neb. 658, 150 N. W. 1019, and *Norfolk Beet Sugar Co.* v. *Haight,* 59 Neb. 100, 80 N. W. 276.

Petitioner William Niklaus alleges that he became the owner of the premises April 13, 1938 (Trans. p. 35). He was served with summons in the foreclosure action on March 21, 1940 (Trans. p. 8). He therefore in no event could have been in possession of the premises for more than two years prior to being made a party to the foreclosure suit.

After the death of H. E. Erickson, one of the defendants in the foreclosure suit, the trial court on March 18, 1940, revived the action against Amanda J. Erickson and Paul W. Erickson as heirs and devisees of H. E. Erickson and they became parties to the suit and filed answers (Trans.

pp. 60, 46). As to the possession of the real estate in question, the respondent alleges in its foreclosure petition that "neither said H. E. Erickson nor the defendants Amanda J. Erickson and Paul W. Erickson, or either of them, were ever at any time in actual, open, adverse and hostile possession of said real estate, or any part thereof" (Trans. p. 28). The respondent further alleges that on September 12, 1927, said H. E. Erickson filed a petition in the District Court of Lancaster County, Nebraska, alleging that the title to said real estate was in Lafayette P. Barnes and therefore not in himself (Trans. p. 28). This was more than two years after the purported deed from Lafayette P. Barnes to H. E. Erickson was filed for record (Trans. p. 27).

It does not appear from the transcript of record what allegations, if any, as to possession of the premises were made by the defendants Amanda J. Erickson and Paul W. Erickson in their respective answers filed in the foreclosure suit. But the petitioners asserted in their answers that William Niklaus and his grantors, Amanda J. Erickson and Paul W. Erickson, were in possession of the real estate for more than ten years prior to March 18, 1940 (Trans. pp. 33, 34, 40, 41). To these answers the respondent filed replies denying all allegations therein contained except those which admitted allegations of the respondent's petition (Trans. pp. 45-46). The issues of fact thereby raised were determined by the trial court in favor of the respondent. In the absence of a bill of exceptions, the Supreme Court of Nebraska was ~~found~~ bound to assume that these issues of fact were correctly determined by the trial court.

II. The Supreme Court of Nebraska Did Not Err in Refusing to Hold That the Petitioners Were Entitled to a Jury Trial.

Section 6 of Article I of the Constitution of Nebraska, respecting right to trial by jury, is only "a constitutional guaranty that the right of trial by jury shall remain as it did prior to the adoption of the constitution of 1875." *Kuhl* v. *Pierce County*, 44 Neb. 584, 62 N. W. 1066; *City of Mitchell* v. *Western Public Service Company*, 124 Neb. 248, 246 N. W. 484; *In re Warner's Estate*, 137 Neb. 25, 288 N. W. 39.

In Nebraska a suit to foreclose a mortgage is an action in equity and for equitable relief. *Macumber* v. *Thomas*, 114 Neb. 290, 207 N. W. 31.

In the foreclosure action at bar the respondent sought equitable relief alone. The petitioners interposed alleged legal defenses. Under the rule in Nebraska this did not secure for them a right to trial by jury. Said the Supreme Court of Nebraska in *Daniels* v. *Mutual Benefit Insurance Co.*, 73 Neb. 257, 102 N. W. 458, a mortgage foreclosure suit:

> "The next question urged is that the court erred in overruling the demand of plaintiffs in error for a trial by jury on the question of their liability for a deficiency judgment. *The determination of this question depends on the nature of the action at its inception. If purely equitable, the right of trial by jury did not exist;* if legal in its nature at its inception, although equitable defenses might be interposed, the right of trial by jury would still remain. Schumacher v. Crane-Churchill Co., (Neb.) 92 N. W. 609. *But where the action as originally instituted seeks equitable relief alone, the interposi-*

> *tion of a legal defense does not secure for the defendant a right to a trial by jury of the legal defenses pleaded.* Albin v. Parmele, (Neb.) 99 N. W. 646; Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383. The action to foreclose the real estate mortgage being purely equitable in its inception, the right to a trial by jury did not arise on defendant's answer to the motion for a deficiency judgment."

It is a general rule that, where a court in the exercise of its equity powers acquires jurisdiction for any purpose, its jurisdiction will continue for all purposes, and it will try all issues. *Parsons Construction Co.* v. *Gifford,* 129 Neb. 617, 262 N. W. 508; *Provident Savings & Loan Ass'n.* v. *Booth,* 138 Neb. 424, 293 N. W. 293, and *Johnson* v. *Weskamp,* 122 Neb. 381, 240 N. W. 514. So in Nebraska "A court of equity has power to determine controverted issues involving the priority of specific liens on real estate." *Shafer* v. *Wilsonville Elevator Company,* 121 Neb. 280, 237 N. W. 155.

Section 9 of Article V of the Constitution of Nebraska, provides that "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide * * *." In construing this section the Supreme Court of Nebraska has held repeatedly that the equity jurisdiction vested in the district courts is exercisable without legislative enactment and is beyond the legislature's power to limit or control. *Burnham* v. *Bennison,* 121 Neb. 291, 236 N. W. 745; *State* v. *Farmers State Bank of Polk,* 121 Neb. 532, 237 N. W. 857, and *State* v. *Nebraska State Bank of Bloomfield,* 124 Neb. 449, 247 N. W. 31.

Even if it were conceded for purpose of argument that the answers of the petitioners in the foreclosure action presented issues triable to a jury, under the practice in Nebraska they waived their right to a jury trial by not filing application to transfer the case to law docket. In no event was the jurisdiction of the court to try the case defeated. *Globe* v. *Swobe*, 64 Neb. 838, 90 N. W. 919; *Krumm* v. *Pillard*, 104 Neb. 335, 177 N. W. 171.

In *Southern R. Co.* v. *Durham*, 266 U. S. 178, the Supreme Court of the United States said:

> "Denial of jury trial in mandamus action by city to compel railroads to eliminate grade crossings is not violative of the Fourteenth Amendment; neither the federal laws nor Constitution giving a right to trial by jury when local statutes and practice prescribe otherwise.
>
> "Determination of the state Supreme Court that respondents in mandamus to compel railroads to eliminate grade crossings are not entitled to jury trial will be accepted by the federal Supreme Court as a correct determination of the local law."

The highest state court is the final authority on state law and has the last word on the construction and meaning of state constitution and statutes. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Vandenbark* v. *Owens-Illinois Glass Company*, 311 U. S. 538; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223; *State of Minnesota, ex rel. Pearson* v. *Probate Court of Ramsey County*, 309 U. S. 270; *Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties* v. *Johnson*, 309 U. S. 485; *Neblett* v. *Carpenter*, 305 U. S. 297.

Obviously, this is not a case "where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court" (Rule 38).

Where a decision is supported on adequate state grounds, as in this case, it is unnecessary to consider objections made to it on alleged federal constitutional grounds. *Susquehanna Power Co.* v. *Maryland Tax Commission,* 283 U. S. 291; *Fox Film Corporation* v. *Muller,* 296 U. S. 207. It is also the rule that even if the decision of the state court ~~was~~ were erroneous, if based on non-federal grounds, the Supreme Court of the United States lacks jurisdiction. *Brinkerhoff-Farris T. & S. Co.* v. *Hill,* 281 U. S. 673; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292.

CONCLUSION.

Since no federal question was determined by the state court and its decision was based wholly on non-federal grounds adequate to support it (Trans. pp. 58-66), it is respectfully suggested that the petition for writ of certiorari should not be granted. *George O. Richardson Machinery Co.* v. *Scott,* 276 U. S. 128; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157; *Utley* v. *City of St. Petersburg, Fla.,* 292 U. S. 106; *Susquehanna Power Co.* v. *Maryland Tax Commission,* 283 U. S. 291; *U. S.* v. *Hastings,* 296 U. S. 188; *Honeyman* v. *Hanan,* 300 U. S. 14.

Respectfully submitted,

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